

TO: Mail Stop 8 Director of the U.S. Patent & Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK
---	---

In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been
filed in the U.S. District Court Northern District of California on the following ☒ Patents or ☐ Trademarks:

DOCKET NO. CV 11-04100 PSG	DATE FILED 8/19/2011	U.S. DISTRICT COURT 280 South First Street, Rm 2112, San Jose, CA 95113
PLAINTIFF TESSENDERLO KERLEY INC		DEFENDANT OR-CAL INC
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 6,110,867		SEE ATTACHED COMPLAINT
2 6,464,995		
3		
4		
5		

In the above—entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading		
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK	
1			
2			
3			
4			
5			

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK Richard W. Wieking	(BY) DEPUTY CLERK Betty Walton	DATE August 23, 2011
---------------------------------	---------------------------------------	-----------------------------

Copy 1—Upon initiation of action, mail this copy to Commissioner Copy 3—Upon termination of action, mail this copy to Commissioner
Copy 2—Upon filing document adding patent(s), mail this copy to Commissioner Copy 4—Case file copy

1 Daniel R. Blakey (State Bar No. 143748)
2 **STEPTOE & JOHNSON LLP**
3 633 West Fifth Street, Suite 700
4 Los Angeles, California 90071
5 Phone: (213) 439-9400
6 Facsimile: (213) 439-9599
7 Email: dblakey@steptoe.com

8 Seth A. Watkins (*pro hac vice* pending)
9 Timothy C. Bickham (*pro hac vice* pending)
10 Houda Morad (*pro hac vice* pending)
11 **STEPTOE & JOHNSON LLP**
12 1330 Connecticut Ave., NW
13 Washington, DC 20036
14 Phone: (202) 429-3000
15 Facsimile: (202) 429-3902
16 Email: sethwatkins@steptoe.com
17 tbickham@steptoe.com
18 hmorad@steptoe.com

19 Attorneys for Plaintiff
20 Tessengerlo Kerley, Inc.

21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

PSG

1 TESSENDERLO KERLEY, INC., a
2 Delaware corporation,

3 Plaintiff,

4 v.

5 OR-CAL, Inc., an Oregon corporation,
6 Defendant.

CV 11 4100

Case No.

COMPLAINT FOR
PATENT INFRINGEMENT

DEMAND FOR JURY TRIAL

1 Plaintiff Tessengerlo Kerley, Inc. ("TKI"), by and through its undersigned attorneys, files
2 this Complaint against defendant OR-CAL, Inc. ("OR-CAL"). In support of its claims, TKI
3 states as follows:

4 **PARTIES**

5 1. TKI is a Delaware corporation having its principal place of business at 2255
6 North 44th Street, Phoenix, Arizona 85008.

7 2. Upon information and belief, defendant OR-CAL is an Oregon corporation,
8 having a principal place of business at 29454 Meadowview Road, Junction City, Oregon
9 97448.

10 3. Defendant OR-CAL manufactures and distributes crop protectants throughout
11 the United States, including in the state of California, in direct competition with TKI.

12 **JURISDICTION AND VENUE**

13 4. This is an action for patent infringement arising under the Patent Act.

14 5. This Court has subject matter jurisdiction over this action under 28 U.S.C. §
15 1338(a), which confers jurisdiction over cases of patent infringement, and under 28 U.S.C. §
16 1331, which confers federal question jurisdiction in general.

17 6. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

18 **INTRADISTRICT ASSIGNMENT**

19 7. This is an Intellectual Property Action to be assigned on a district-wide basis
20 pursuant to Civil Local Rule 3-2(c).

21 **NATURE OF THE ACTION**

22 8. This action is brought under the Patent Act, 35 U.S.C. § 271 *et seq.*

23 9. TKI seeks injunctive and compensatory damages for OR-CAL's willful
24 infringement of TKI's United States Patent Nos. 6,110,867 ("the '867 patent") and 6,464,995
25 ("the '995 patent").

26 10. TKI and OR-CAL are direct competitors in the market for the manufacture and
27 sale of crop protectants.

28 11. OR-CAL's patent infringement has resulted in substantial harm to TKI in the

1 form of lost sales and lost profits. Injunctive relief from this Court is necessary to prevent
2 further harm to TKI.

3 **BACKGROUND**

4 **TKI's Patents**

5 12. The '867 patent, entitled "Method for Providing Enhanced Photosynthesis,"
6 issued on August 29, 2000 in the name of inventors David Michael Glenn, Dennis G.
7 Sekutowski, and Gary J. Puterka. TKI enjoys all exclusive rights and privileges with respect
8 to the '867 patent in the United States, including the right to enforce the '867 patent in its
9 own name. A copy of the '867 patent is attached hereto as Exhibit 1.

10 13. The '867 patent was the subject of reexamination proceedings, Application
11 Serial No. 90/006,658, before the United States Patent and Trademark Office ("USPTO"). A
12 reexamination certificate was issued by the USPTO on March 7, 2006.

13 14. The subject matter of the '867 patent relates to a method for enhancing
14 photosynthesis of a horticultural crop by increasing carbon dioxide assimilation of said
15 horticultural crop which comprises applying to the surface of said horticultural crop an
16 effective amount of one or more highly reflective particulate materials, said particulate
17 materials being finely divided, and wherein the particles as applied allow for the exchange of
18 gases on the surface of said crop and the finely divided particulate materials have a median
19 individual particle size below about 3 microns.

20 15. The '995 patent, entitled "Treated Horticultural Substrates," issued on October
21 15, 2002 in the name of inventors Dennis G. Sekutowski, and Gary J. Puterka, and David
22 Michael Glenn. TKI enjoys all exclusive rights and privileges with respect to the '995 patent
23 in the United States, including the right to enforce the '995 patent in its own name. A copy
24 of the '995 patent is attached hereto as Exhibit 2.

25 16. The subject matter of the '995 patent relates to a method for enhancing the
26 horticultural effect of horticultural substrates selected from the group consisting of fruits,
27 vegetables, trees, flowers, grasses, roots, and landscape and ornamental plants which
28 comprises applying a slurry comprising water, a surfactant, and one or more particulate

1 materials, selected from the group consisting of calcium carbonate, hydrous kaolin, calcined
2 kaolin and mixtures thereof, to the surface of said substrate to form a membrane comprised
3 of one or more particulate layers and the surfactant, said layers comprising one or more
4 particulate materials, said particulate materials being finely divided, and wherein said
5 membrane allows for the exchange of gases on the surface of said substrate.

6 **Crop Protectant Products**

7 17. TKI manufactures and sells a kaolin-based crop protectant product under the
8 brand name Surround[®], for use as a broad spectrum agricultural crop protectant for
9 controlling damage from various physiological disorders such as sunburn and heat stress as
10 well as a growth enhancer. Exhibit 3 (Surround label). TKI has the right to exclude from the
11 marketplace any competing product for which its application infringes at least claim 1 of the
12 '867 patent and/or claim 23 of the '995 patent.

13 18. On information and belief, OR-CAL has manufactured, offered for sale, and/or
14 sold calcium carbonate sun protectant products for crops, including products ultimately
15 distributed as Mask[®] and/or Diffusion[®].

16 19. The Mask and/or Diffusion sunburn protectant products have been and/or are
17 distributed by Wilbur-Ellis Company, which has its Corporate and Agribusiness offices in
18 this judicial district, respectively at 345 California Street, San Francisco, California 94104
19 and 1801 Oakland Boulevard, Walnut Creek, California 94596. *See* Exhibit 4 (Mask label)
20 and Exhibit 5 (Diffusion label). On information and belief, the Mask and/or Diffusion
21 products have been and/or are manufactured and packaged by defendant OR-CAL and sold
22 to Wilbur-Ellis Company which in-turn offers for sale, sells, and has sold these products to
23 others.

24 **OR-CAL's Infringement of TKI's Patents**

25 20. Upon information and belief, application of OR-CAL's calcium carbonate
26 products, such as the Mask and/or Diffusion products, infringes at least claim 1 of the '867
27 patent and claim 23 of the '995 patent. Promotional materials for the Mask and Diffusion
28 products describes them as: (1) a flowable micronized dispersion of calcium carbonate; (2)

1 recommended as a protectant against, and used in minimizing, sunburn and heat stress; (3)
2 optimizing and allowing for greater photosynthesis; and/or (4) providing a healthy crop and
3 the best yields. *See, e.g.*, Exhibits 4, 5, and 6 (brochure entitled "Diffusion. The Science of
4 Light Management.").

5 COUNT I

6 Infringement of U.S. Patent No. 6,110,867

7 21. Paragraphs 1 through 20 of the complaint are incorporated by reference as
8 though fully set forth herein.

9 22. All claims of the '867 patent are presumed valid and enforceable.

10 23. On information and belief, defendant OR-CAL has contributorily infringed
11 and/or actively induced the infringement under 35 U.S.C. § 271, and continues to
12 contributorily infringe and/or actively induce the infringement under 35 U.S.C. § 271, of at
13 least claim 1 of the '867 patent by (1) making, having made, selling, and/or offering for sale,
14 (2) authorizing others to make, have made, sell, and/or offer for sale, and/or (3) causing
15 others to use calcium carbonate products such as the Mask and/or Diffusion products.

16 24. Defendant OR-CAL's infringement is committed with knowledge of the '867
17 patent and is intentional, willful and deliberate.

18 25. As a result of defendant OR-CAL's infringement of the '867 patent, TKI has
19 been damaged and will be further damaged, and is entitled to be compensated for such
20 damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

21 26. As a result of defendant OR-CAL's infringement of the '867 patent, TKI has
22 suffered and will continue to suffer irreparable harm, for which TKI has no adequate remedy
23 at law, unless the Court enjoins such infringing activities pursuant to 35 U.S.C. § 283.

24 COUNT II

25 Infringement of U.S. Patent No. 6,464,995

26 27. Paragraphs 1 through 26 of the complaint are incorporated by reference as
27 though fully set forth herein.

28 28. All claims of the '995 patent are presumed valid and enforceable.

29. On information and belief, defendant OR-CAL has contributorily infringed and/or actively induced the infringement under 35 U.S.C. § 271, and continues to contributorily infringe and/or actively induce the infringement under 35 U.S.C. § 271, of at least claim 23 of the '995 patent by (1) making, having made, selling, and/or offering for sale, (2) authorizing others to make, have made, sell, and/or offer for sale, and/or (3) causing others to use calcium carbonate products such as the Mask and/or Diffusion products.

30. Defendant OR-CAL's infringement is committed with knowledge of the '995 patent and is intentional, willful and deliberate.

31. As a result of defendant OR-CAL's infringement of the '995 patent, TKI has been damaged and will be further damaged, and is entitled to be compensated for such damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

32. As a result of defendant OR-CAL's infringement of the '995 patent, TKI has suffered and will continue to suffer irreparable harm, for which TKI has no adequate remedy at law, unless the Court enjoins such infringing activities pursuant to 35 U.S.C. § 283.

REQUEST FOR RELIEF

WHEREFORE, TKI respectfully requests that this Court enter a Judgment and Order in its favor and against defendant OR-CAL as follows:

(a) A judgment that defendant OR-CAL has contributed to and/or actively induced the infringement of the '867 patent by (i) making, having made, selling, and/or offering for sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others to use calcium carbonate products such as the Mask and/or Diffusion products in the United States;

(b) A judgment that defendant OR-CAL has contributed to and/or actively induced the infringement of the '995 patent by (i) making, having made, selling, and/or offering for sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others to use calcium carbonate products such as the Mask and/or Diffusion products in the United States;

(c) A judgment and order permanently enjoining defendant OR-CAL from further

1 infringing the '867 patent by (i) making, having made, selling, and/or offering for sale, (ii)
2 authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others
3 to use calcium carbonate products such as the Mask and/or Diffusion products in the United
4 States;

5 (d) A judgment and order permanently enjoining defendant OR-CAL from further
6 infringing the '995 patent by (i) making, having made, selling, and/or offering for sale, (ii)
7 authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others
8 to use calcium carbonate products such as the Mask and/or Diffusion products in the United
9 States;

10 (e) A judgment and order requiring defendant OR-CAL to pay all available and
11 legally permissible damages to compensate TKI for defendant's infringing acts, but in no
12 event less than a reasonable royalty in accordance with 35 U.S.C. § 284;

13 (f) A finding that defendant's conduct is willful, warranting an award of treble
14 damages under 35 U.S.C. § 284;

15 (g) A finding that this case is exceptional under 35 U.S.C. § 285, warranting an
16 award to TKI of its costs, including attorney fees, and other expenses incurred in connection
17 with this action;

18 (h) A judgment and order requiring that defendant OR-CAL pay TKI pre-
19 judgment interest and post-judgment interest on all damages awarded;

20 (i) Such further relief as this Court deems just and appropriate.
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28